In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1041

NEZ PERCE TRIBE OF INDIANS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of a determination of the Court of Claims (Pet. App. 13–28) concerning one of the provisions of an 1893 Agreement (Appendix, *infra,* pp. 5–6) in which petitioner ceded certain tribal land to the United States. The court below remanded to the Indian Claims Commission petitioner's claim that the consideration paid under the 1893 Agreement was "unconscionable" (see Section 2, Indian Claims Commission Act, 25 U.S.C. 70a) for determination under guidelines set forth in the court's opinion. The Court of Claims went on to state that, under Article III of the Agreement, there was no basis for recovery of interest on any additional sum for the land that might be awarded to petitioner.

248-574—67

Whether there was, in fact, an unconscionable difference in the consideration paid by the United States for the land and its fair market value has not yet been determined.

With respect to the issue of interest, which petitioner seeks to have reviewed, the Court of Claims stated (Pet. App. 26–28):

> It is, of course, well established that interest does not run on claims against the United States unless there is an express statutory or contract provision to the contrary or unless there is a showing of delay in payment for lands 'taken' in contravention of the Fifth Amendment. * * * The Agreement here specified a sum to bear interest, and that sum apparently was paid and did bear interest; the sum claimed here is over and above the amount specified in the Agreement. In short, the Agreement has reference only to the amount that was actually agreed upon and gives no warrant for reading in a requirement that any sum determined in the future to be the fair market value should bear interest.

1. The decision of the Court of Claims—that interest may not be recovered under Article III of the agreement—is plainly correct. There is no reason for this Court to review the construction of one of the specific terms of the articles of the particular Agreement. This Court and the Court of Claims have long adhered to the traditional rule that interest on claims against the United States cannot be recovered, absent express congressional direction to the contrary. See, *e.g.*, *United States* v. *Tillamooks*, 341

U.S. 48; *Confederated Salish and Kootenai Tribes* v. *United States,* 175 Ct. Cl. 451, certiorari denied, 385 U.S. 921. The only exception to the rule is when the taking entitles the claimant to just compensation under the Fifth Amendment. *United States* v. *Tillamooks, supra,* at 49. Since the Agreement does not provide for the payment of interest beyond that specified, since no statute provides for the payment of interest upon a claim grounded in Section 2 of the Indian Claims Commission Act (25 U.S.C. 70a), and since there was no Fifth Amendment taking, no interest accrues to petitioner.

There is no merit to petitioner's contention that this case presents a conflict in decisions of the Court of Claims with those of this Court and with its own decisions. The decision below involves the interpretation of a specific provision of an Agreement between petitioner and the United States. The cases said to be in conflict involved provisions of different treaties or agreements dissimilar to the one here. For example, in *United States* v. *Blackfeather,* 155 U.S. 180, and in *Mille Lac Chippewas* v. *United States,* 47 Ct. Cl. 415, 462, reversed on other grounds, 229 U.S. 498, further proceedings, 51 Ct. Cl. 400, 407–408, upon which petitioner relies, the pertinent treaty or agreement provided for payment of interest on a sum not definitely ascertained and clearly conveyed that interest be paid on all the proceeds. In contrast, the agreement here—specifying a fixed sum on which interest was to be, and actually was, paid—precludes the broad interpretation that Congress intended or authorized interest to be paid on further amounts.

2. In any event, the petition is premature. As we have pointed out, petitioner has not yet been adjudged entitled to recover any amount from the United States. Should the Indian Claims Commission, on remand from the Court of Claims, determine the substantive issue adversely to petitioner, the question of interest would be moot. On the other hand, should the Commission and the court below grant recovery (but without interest), petitioner at that time may seek review in this Court of the determination that it is not entitled to interest on the amount recovered. See *Mercer* v. *Theriot,* 377 U.S. 152; *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.,* 240 U.S. 251, 257–258; cf. Stern & Gressman, *Supreme Court Practice* § 4–19 (3d ed. 1962).

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
EDWIN L. WEISL, JR.,
Assistant Attorney General.
ROGER P. MARQUIS,
GEORGE R. HYDE,
Attorneys.

MARCH 1967.

APPENDIX

The pertinent provision of the Agreement with the Nez Perce Indians in Idaho, 28 Stat. 286, 326, 329–330, is as follows:

ARTICLE III

> In consideration for the lands ceded, sold, relinquished, and conveyed as aforesaid the United States stipulates and agrees to pay to the said Nez Perce Indians the sum of one million six hundred and twenty-six thousand two hundred and twenty-two dollars, of which amount the sum of six hundred and twenty-six thousand two hundred and twenty-two dollars shall be paid to said Indians per capita as soon as practicable after the ratification of this agreement. The remainder of said sum of one million six hundred and twenty-six thousand two hundred and twenty-two dollars shall be deposited in the Treasury of the United States to the credit of the "Nez Perces Indians, of Idaho," and shall bear interest at the rate of five per centum per annum, which principal and interest shall be paid to said Indians per capita as follows, to wit: At the expiration of one year from the date of the ratification of this agreement the sum of fifty thousand dollars, and semiannually thereafter the sum of one hundred and fifty thousand dollars with the interest on the unexpended portion of the fund of one million dollars until the entire

amount shall have been paid, and no part of the funds to be derived from the cession of lands by this agreement made shall be diverted or withheld from the disposition made by this article on account of any depredation or other act committed by any Nez Perce Indian, prior to the execution of this agreement, but the same shall be actually paid to the Indians in cash, in the manner and at the times as herein stipulated.

U.S. GOVERNMENT PRINTING OFFICE: 1967